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FILED

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

RAYMOND L. GOODMAN,
Petitioner,

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION AND BRIEF ON BEHALF OF PETITIONER

JOHN N. CRUDUP
Gainesville, Georgia

MARVIN W. LEWIS
Miami Beach, Florida

ROBERT B. THOMPSON
Gainesville, Georgia

Attorneys for Petitioner

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PETITION AND BRIEF ON BEHALF OF PETITIONER

(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in 285 F. 2d 378. As a part of its opinion in this case, the Court adopted its opinion in the companion case of **United States of America v. Strauss**, October 14, 1960, 283 F. 2d 155. A copy of the official opinion in each case is appended hereto.

(b)

GROUNDS OF JURISDICTION

The opinion sought to be reviewed, entitled **United State of America v. Raymond L. Goodman,** No. 18284, is dated December 23, 1960. A petition for rehearing was denied without opinion on February 16, 1961. An order was entered by this Court on March 10, 1961, granting an extension of time within which to petition for certiorari until April 17, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), and under and by virtue of Title 18 U.S.C. 3772, within the time provided for in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1943 (292 U. S. 661, 666, 54 S. Ct. XXXIX), and Rule 22 (2) of the Supreme Court Rules.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided important questions of federal law of gravity and importance in the administration of crimnial justice which have not been, but should be settled by this Court; said Court has misconstrued and misapplied decisions of this Court respecting the standards which must be met in pleading criminal indictments; and has so far departed from the accepted and prescribed course of judicial proceedings as to require the exercise of this Court's power of supervision. The Court of Appeals held that where a timely attack is made as to the validity of counts of an indictment, pursuant to Rule 12, Federal Rules of Criminal Procedure, prior to trial; nevertheless, the omission of an essential element of the offense sought to be charged is cured by presumption; that a count of an indictment which is admittedly duplicitous, in that it joins in the same count two distinct offenses, can be cured by the election of the United States as to which charge it shall prosecute; and where an indictment contains prejudicial surplusage,

even under circumstances where the accused cannot know in advance of trial what portions are surplusage, the only remedy available to him is a motion to strike the surplusage.

These rulings contravene and render nugatory, Rules 7(c), 8(a) and 12(b) (2), Federal Rules of Criminal Procedure, and misconstrue and misapply the rulings of this Court in **Hagner v. United States**, 285 U. S. 427, and **United States v. Debrow**, 346 U. S. 374.

(c)

QUESTIONS PRESENTED

1.

Upon a timely, proper motion pursuant to Rule 12 (b) (2), Federal Rules of Criminal Procedure, does a count of an indictment seeking to charge a violation of 18 U.S.C. 1341, respecting the delivery of non-mailable matter, which fails to allege either that the mail was delivered according to the direction thereon or at the place at which it was directed to be delivered by the person to whom it was addressed, charge an offense against the United States.

2.

Is it essential to the validity of a count of an indictment under the Mail Fraud Statute, 18 U.S.C. 1341, in view of the ruling of this Court in **Parr v. United States**, U.S. , 80 S. Ct. 1171, 4 L Ed. 2nd 1277 that sufficient facts be alleged therein to show that the use of the mails was an integral part of the execution of the fraud or incident to an essential part of the scheme to defraud.

3.

May a count of an indictment which is duplicitous in

that it charges two distinct offenses in a single count be validated by the election of the United States as to which offense it will prosecute.

4.

Is an indictment which fails to allege in plain, concise and definite language the essential facts constituting the offenses charged, but which alleges such facts by innuendo and implication only, in vague, indefinite, prejudicial, and frequently irrelevant language, sufficient to meet the test of Rule 7(c), Federal Rules of Criminal Procedure, and is such an indictment subject to pre-trial attack under Rule 12(b) (2), Federal Rules Criminal Procedure.

5.

Where a count of indictment charges a conspiracy to violate the Mail Fraud Statute and Bankruptcy Act, and the Court of Appeals rules the indictment insufficient to charge a conspiracy to violate the Mail Fraud Statute but sufficient to charge a conspiracy to violate the Bankruptcy Act, it being impossible for the accused to distinguish the parts of the indictment dealing with the conspiracy to violate the Mail Fraud Statute from the parts of the indictment dealing with the conspiracy to violate the Bankruptcy Act, does the count as thus modified conform to the requirements of Rule 7(c), Federal Rules of Criminal Procedure, and meet the standards of criminal pleading required by the Constitution of the United States and the decisions of this Court.

(d)

STATUTES INVOLVED

18 U.S.C. 152. Printed in Appendix.
18 U.S.C.A. 1341. Frauds and swindles.

"Whoever, having devised of intending to device any scheme or artifice to defraud, or for ob-

taining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, § 34, 63 Stat. 94."

Rule 7(c), Federal Rules of Criminal Procedure.

"The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation

or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

Rule 8(a), Federal Rules of Criminal Procedure.

"Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Rule 12(b) (2), Federal Rules of Criminal Procedure.

"Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

(e)

STATEMENT OF CASE

Petitioner was indicted in the United States District

Court for the Southern District of Florida by an indictment charging eight counts. The first five counts relate to the Mail Fraud Statute, 18 U.S.C. 1341, each charging a common scheme to defraud and the causing to be delivered by mail to a specified bank at Miami Beach, Florida, a specified check. The sixth and seventh counts are drawn under 18 U.S.C. 152, purporting to charge petitioner with the transfer and concealment of assets of a bankupt corporation and the eighth count charges a conspiracy to violate both 18 U.S.C. 152 and 1341. The district court sustained petitioner's motion to dismiss the indictment as to all eight counts. The United States appealed from this judgment to the United States Court of Appeals for the Fifth Circuit, which court reversed the judgment and remanded the case.

Each of the first five counts of the indictment are identical, except each charges a different use of the mails with respect to the delivery of a particularly identified check. Thus, the first count, illustrative of the five mail fraud counts, charges that for the purpose of executing the alleged scheme to defraud, petitioner caused to be delivered by the United States Mails at Miami Beach, Florida, to a named bank a described check. It is not alleged that the bank was the addressee of the mail, that such delivery was according to the direction on the mail matter or that the mail was delivered at the place at which it was directed to be delivered by the person to whom it was addressed. The Court of Appeals held that the allegation of delivery to the bank raised the presumption that the mail was delivered to the addressee and that by utilizing this presumption, the charge was sufficiently alleged in the indictment.

The sixth count of the indictment charges that petitioner, an officer of a corporation, in contemplation of bankruptcy proceedings being filed against the corporation, knowing that the corporation "was subject to a petition in bankruptcy," and "in contemplation of bank-

ruptcy proceedings by or against" the corporation, transferred and concealed certain assets "represented by monies of the" corporation, and transferred and concealed from the bankruptcy court certain assets of the corporation "represented by" certain checks alluded to. The Court of Appeals held this count of the indictment duplicitous in that it charged both a concealment and transfer of assets in contemplation of bankruptcy and a transfer and concealment from the officers of the bankruptcy court. However, the court held that this defect is not fatal, but might be cured by the United States electing which offense it will prosecute. The court did not rule whether such election should be made before or after the evidence is presented.

In the seventh count, it is charged that petitioner, while an officer of a corporation "subject to the filing of a petition in bankruptcy and adjudication as a bankrupt," knowing this fact and in contemplation of a proceeding being instituted against the corporation and "in contemplation of bankruptcy proceedings by or against" the corporation, transferred "the assets represented by" a 99-year lease held by the corporation with intent to defeat the Bankruptcy Act. The Court of Appeals approved this count as being in conformity with the requirements of law respecting criminal indictments.

As heretofore stated, the eighth count of the indictment charges a criminal conspiracy to violate 18 U.S.C. 152 and 1341. The Court of Appeals held that the count is sufficient to the extent that it charges a conspiracy to commit offenses against the Bankruptcy Act, but insufficient to show a conspiracy to violate the Mail Fraud Statute, and that the presence of surplusage does not justify the dismissal of the entire count.

Jurisdiction of the cause in the United States District Court for the Southern District of Florida is founded upon

the allegation in the indictment that the offenses charged were committed within the juridiction of that court. Jurisdiction of the United States Court of Appeals for the Fifth Circuit to review the judgment at the instance of the United States is founded upon 18 U.S.C. 3731.

(h)

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT

PART I

FAILURE OF COUNTS ONE THROUGH FIVE TO ALLEGE DELIVERY OF MAIL ACCORDING TO DIRECTION THEREON

The Mail Fraud Statute prohibits one from causing certain mail matter to be delivered by mail "according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed." Any other use of the mails as pertinent here, even if utilized for the purpose of executing or attempting to execute a scheme to defraud would necessarily be excluded from the prohibitions of the statue. Thus, the quoted provision above is an essential element of the offense.

While it is true that the sufficiency of an indictment may not be tested by determining whether it could have been made more definite and certain, it is fundamental that every essential element of the offense must be alleged in the indictment. **United States v. Debrow**, 346 U.S. 374. The omission of an essential element must destroy the indictment, and it "cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital." **United States v. Hess**, 124 U.S. 483. The liberalization of the rules of criminal pleading has not eliminated the necessity that the essential ingredients of the offense be charged clearly

and distinctly.

The Court of Appeals, following **United States v. Guest**, 2 Cir., 74 F. 2d 730, which followed the ruling in **Hagner v. United States**, 285 U.S. 427, misconstrued and misapplied the ruling of this Court in the last cited case, and held, in substance, that the allegation of delivery by mail to the bank raised the presumption and justified the inference that the mail was delivered to the addressee, thereby supplying the deficiency in alleging an essential element of the offense.

In **Hagner v. United States**, supra, this Court expressly pretermitted ruling on the question of whether an indictment failing to allege this element of the offense, except by inference, would be subject to a pre-trial motion. The question was raised in that case by a motion in arrest of judgment. Also, in that case, as in **United States v. Guest**, supra, the indictment alleged that the mail was addressed to a particular party at a specified address. This Court held that proof that a letter properly directed was placed in a post office created a presumption that it was actually received by the addressee.

We respectfully submit that in the absence of an allegation that the mail was addressed to the bank, there is no presumption that it was: (1) delivered according to the direction thereon or (2) delivered at the place at which it was directed to be delivered by the person to whom it was addressed. Furthermore, at this stage of the proceeding, resort to presumptions should not be necessary in order to determine the validity of an indictment. The Court of Appeals, in ruling to the contrary, has misconstrued and misapplied the rulings of this Court in **Hagner v. United States**, supra, and **United States v. Debrow**, supra, and has authorized and endorsed accusation by innuendo, inference, intendment and presumption, thereby neutralizing the provisions of Rules 7(c) and 12(b)(2), Federal Rules of Criminal Procedure.

PART II

MUST A MAIL FRAUD INDICTMENT ALLEGE THAT THE USE OF THE MAILS WAS ESSENTIAL TO THE FRAUD

As stated above, every essential ingredient of an offense must be alleged in an indictment in order for it to charge an offense against the United States. Ordinarily, an indictment drawn in the language of the statute under which the charge originates is sufficient to charge an offense. However, where the statute omits an essential element of the offense or includes it by implication, the indictment should allege it directly and with certainty. **United States v. Carll**, 105 U.S. 611; **United States v. Cruikshank**, 92 U.S. 542.

In **Parr v. United States**, ... U.S. ....., 80 S. ct. 1171, 4 L. Ed. 2d 1277, this Court reversed a conviction under the Mail Fraud Statute where the evidence failed to disclose that the use of the mails was an integral part of the execution of the fraud or incident to an essential part of the scheme to defraud. Obviously, in order to charge the offense, the indictment must charge the foregoing element of the offense. The mail fraud counts allege merely that "for the purpose of executing the aforesaid scheme" the petitioner caused certain mail to be delivered. This does not in terms, by implication or otherwise show or allege that the use of the mails was an essential part of the scheme or an integral part of its execution. In fact despite its length and verbosity, there is nothing in the indictment other than the conclusion quoted above to show any connection between the scheme to defraud and the use of the mails. The petitioner should not be required to answer and stand trial on counts of an indictment which do not in some way advise him as to what connection exists between the execution of the scheme to defraud and the use of the mails, where, in order to charge an offense, it is not only necessary that the mails be used in

the execution of the scheme, but essential that such use be a use specified and recognized in the Parr case.

In the administration of criminal justice, an accused should not be put to trial on an indictment which omits an essential ingredient of the offense, or supplies such element only by the vaguest sort of conclusionary statement. If the connection between the alleged fraud and the use of the mails were properly pleaded in the indictment in the Parr case, a trial on the merits would have been unecessary and the litigation would have been terminated upon a ruling on a motion to test the sufficiency of the indictment to charge an offense.

PART III

MAY DUPLICITY IN A COUNT OF AN INDICTMENT BE CURED BY THE ELECTION OF THE UNITED STATES AS TO WHICH OFFENSE IT WILL PROSECUTE

In the courts below, petitioner urged a number of reasons in support of his contention that the sixth count of the indictment is duplicitous. He urged that it is duplicitous in charging a transfer and concealment of the same property; in charging a transfer on a number of different dates of separate items of assets, each being a separate offense; and in charging a transfer and concealment in contemplation of bankruptcy and also a transfer and concealment from the officers of the bankruptcy court. The Court of Appeals held that the latter contention is correct, but that the duplicity in the count can be cured by the election of the United States as to which of the offenses it will prosecute.

Our research has failed to disclose any authority to support the view of the Court of Appeals that a duplicitous count of an indictment can be validated in this fashion. The ruling appears to be without precedent. It renders

Rules 7(c), which requires a clear and concise statement of the essential elements of the offense to be alleged, and Rule 8(a), which permits the joinder of two offenses only in separate counts of an indictment, absolutely meaningless.

To permit or to require the United States to make such an election would, in effect, constitute an amendment to the indictment without resubmitting the same to the Grand Jury. **Ex parte Bain**, 121 U.S. 1; **Edgerton v. United States**, 9 Cir., 143 F. 2d 697; **Creel v. United States**, 8 Cir., 21 F. 2d 690, 691; **United States v. Dembowski**, D. C. Mich., 252 F. 894, and the authorities collected and discussed in **Carney v. United States**, 9 Cir., 163 F. 2d 784, 788-790.

Where an indictment is duplicitous, words of the indictment which charge a distinct offense cannot be disregarded or rejected as surplusage. Duplicity is not a mere technical defect, but is one of substance. **Creel v. United States**, supra; **Bratton v. United States**, 10 Cir., 73 F. 2d 795. Where the duplicity in an indictment results from the use of the disjunctive rather than the conjunctive, the same is "destitute of the necessary certainty, and (is) wholly insufficient." **Price v. United States** 5 Cr., 150 F. 2d 283. Does a different rule apply where the indictment is duplicitous for the reason stated in the opinion of the Court? Surely, this cannot be, for by the election of the prosecutor the count of the indictment which is otherwise destitute of the necessary certainty and wholly insufficient is amended so as to constitute it a valid charge. The indictment, in this event, would not be the same indictment which was returned by the Grand Jury, but it would be substantially amended within the rulings of the authorities cited above.

PART IV

IS DISMISSAL OF AN INDICTMENT PROPER REMEDY FOR FAILURE TO CONFORM TO REQUIREMENTS OF RULE 7(c)

The requirement that an indictment set forth in plain, concise and definite terms the essential facts constituting the offense charged sets the standard under which an indictment must be drawn.. Rule 7(c), Federal Rules of Criminal Procedure. Despite the fact that the Court of Appeals held the first five counts of the indictment valid if aided by a presumption of evidence; the sixth count duplicitous, but valid at the election of the United States; the seventh count valid, if "hypercritical" contentions be disregarded; and the eighth count valid in part, insofar as it attempts to charge a conspiracy to violate the Bankruptcy Act, if certain surplusage be disregarded, the Court found the indictment to conform to the standards of criminal pleadings prescribed by the cited Rule and by this Court in **United States v. Debrow**, supra.

The indictment in full context appears on page 1 through 19 in the certified copy of the record filed with this Court. We respectfully ask the Court to read the indictment in full. At best, it is a difficult document to comprehend, because of its repetition, vagueness, frequent conclusions and useless verbosity. Its allegations are so broad and sweeping, it would be difficult to find a more flagrant violation of Rule 7(c). We hesitate extracting examples of the language to which we refer for fear that we might limit the Court's consideration to only those which we might select. The Court of Appeals in **United States v. Williams**, 5 Cir., 203 F. 2d 572, 574, held that indirect expressions, implied allegations and argumentative statements in language are defects in an indictment that may be fatal if struck at by a timely motion before trial; however, in the present case it disregarded its prior ruling.

As a defendant in a criminal case has no opportunity to get his defenses before the jury in the form of written pleadings, the prosecutor is somewhat advantaged by an opportunity to present his case in the form of a written indictment. He should be admonished not to take advantage of his superior position and prejudice the defendant by the language he should select to use in the indictment. Insofar as we have been able to determine, this Court has never had occasion to rule on the question of whether a dismissal of an indictment is a proper remedy for its failure to conform to the requirements of Rule 7(c). There can be no question, however, that the Court has the power, and in this case, we insist, the duty, to dismiss such an indictment. Cf. **Rea v. United States** 350 U.S. 214; **McNabb v. United States**, 318 U.S. 332.

It is respectfully submitted that the Court of Appeals has, by its opinion in the present case, stripped Rule 12(b)(2) of its efficacy, diregarded Rules 7(c) and 8(a) and misconstrued the opinion of this Court in **United States v. Debrow**, supra. In this connection, the Court has approved a standard of indictment not recognized by the Rules of Criminal Procedure and the decisions of this Court, which calls upon this Court to exercise its power of supervision and to set by its decision appropriate standards for the application of the Criminal Rules.

PART V

WHERE COUNT OF INDICTMENT IS SO MODIFIED BY RULING OF COURT AS TO RENDER IT IMPOSSIBLE FOR ACCUSED TO KNOW WHAT PORTIONS THEREOF RELATE TO CHARGES, DOES COUNT AS MODIFIED MEET THE STANDARDS REQUIRED FOR CRIMINAL INDICTMENTS.

Count Eight of the indictment charges a conspiracy between petitioner and Strauss. This is the only count involving Strauss. His motion to dismiss this count as to

him was sustained in the trial court and the judgment was appealed by the United States to the United States Court of Appeals for the Fifth Circuit. That Court reversed the judgment in part and remanded the case for trial as to Strauss. In its opinion in the present case, the Court of Appeals adopted its opinion in the Strauss case. As hereinbefore indicated, that ruling, made applicable to the present case, held Count Eight sufficient to the extent that it charges a conspiracy to commit offenses against the Bankruptcy Act, but insufficient to show a conspiracy to violate the Mail Fraud Statute, and that the presence of surplusage does not justify dismissal of the entire count.

The Court held that the portion of the indictment which relates to the allegations of mail fraud conspiracy might be disregarded as surplusage. Indeed, under Rule 7(d), Federal Rules of Criminal Procedure, petitioner has a right to move that such surplusage be stricken from the indictment. The insuperable difficulty, however, lies in the fact that it is impossible for petitioner to know what is essential to the indictment as it is presently constituted. Throughout the trial the same problem will be constantly present as to the admissibility of evidence. Both the trial court and petitioner will have to rely upon the judgment of the prosecuting attorney as to what part of the indictment and what portion of the evidence is pertinent and admissible. Surely, this type pleading does not meet the constitutional requirements that prosecution shall procede by indictment and the accused shall be advised of the charges against him required. Amendments V and VI, United States Constitution.

Count Eight of the indictment consists of five printed pages of the record and covers a period over 27 months. It contains a full measure and more of sweeping, dragnet-type allegations in the vaguest of terms. As now modified by the opinion of the Court of Appeals, it is a quagmire of pleading which renders it impossible for petitioner to

either adequately prepare his defense or defend himself upon the trial. This count of the indictment, as the other seven counts, fails to meet the minimum requirements of criminal pleadings approved by this Court.

The Court of Appeals recognized the imperfections of the conspiracy count, but ruled that the only remedy available to petitioner is that afforded by Rule 7(d), that is, a motion to strike the surplusage. As we have shown, by the very nature of the situation, it is impossible for petitioner to avail himself of this remedy. We respectfully submit that the remedy afforded by Rule 7(d) is not the exclusive remedy, but that the Court of Appeals should have sustained the judgment of the trial court.

CONCLUSION

The judgment of the trial court was right. It should have been affirmed. For the reasons stated herein and on each ground hereof, this Court should grant the writ of certiorari and reverse the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

John N. Crudup

Marvin W. Lewis

Robert B. Thompson

Counsel for Petitioner

JUDGMENT.

Extract from the Minutes of December 23, 1960.

UNITED STATES OF AMERICA,

No. 18284 versus

RAYMOND L. GOODMAN

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court dismissing all eight counts of the indictment as against Goodman in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court.

ORDER DENYING REHEARING.

Extract from the Minutes of February 16, 1961.

UNITED STATES OF AMERICA,

No. 18284 versus

RAYMOND L. GOODMAN.

The petition for rehearing in the above-styled and numbered cause is hereby

DENIED.

APPENDIX

§ 18 U.S.C. 152. Concealment of assets; false oaths and claims; bribery

Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of bankrupt; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankrutcy proceeding; or

Whoever knowingly and fraudulently presents under oath any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or

Whoever, after the filing of a bankruptcy proceeding

or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankupt; or

Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

SUPREME COURT OF THE UNITED STATES

NO. ——, October Term, 1960.

RAYMOND L. GOODMAN,
Petitioner,

v.

UNITED STATE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

April 17, 1961.

/S/ Hugo L. Black
Associate Justice of the Supreme Court of the United States.

Dated this 10th day of March, 1961.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18284

UNITED STATES OF AMERICA,
Appellant,

versus

RAYMOND L. GOODMAN,
Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(December 23, 1960)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

RIVES, Circuit Judge: The district court sustained the defendant's motion to dismiss an eight-count indictment and the United States appeals.[1]

The first five counts charge violations of the mail fraud statute, 18 U.S.C.A. §1341. Counts 6 and 7 charge violations of the criminal bankruptcy statute, 18 U.S.C.A.

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[1] As permitted by 18 U.S.C.A. §3731.

§152, and Count 8 charges a violation of the conspiracy statue, 18 U.S.C.A. §371.

The defendant first attacks the indictment as a whole for misjoinder of offenses. We think that there was no such misjoinder under Rule 8 (a), Federal Rules of Criminal Procedure.[2] We need not elaborate, for whether there was a violation of Rule 8 (a), or any other prejudicial joinder of offenses, the proper relief, especially under the circumstances of this case, is not to dismiss the entire indictment but to order an election or separate trial of counts. Rule 14, Federal Rules of Criminal Procedure; **Finnegan v. United States**, 8 Cir., 1955, 204 F.2d 105, 109.

The defendant complains also that many of the counts contain prejudicial surplusage. Again, however, motion to strike the surplusage, rather than dismissal of the entire count, is the appropriate remedy. Rule 7 (d), Federal Rules of Criminal Procedure; **United States v. Hood**, 5 Cir., 1953, 200 F.2d 639, 642.

The criticism of each of the first five counts is the same as that answered by the Second Circuit in **United States v. Guest**, 1935, 74 F.2d 730, 731:

> "It is also argued that the indictment fails to charge that the defendant caused the letter to be delivered 'according to the direction thereon.' This is without substance. The indictment charges that

[2] "(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." 18 U.S.C.A.

he caused the letter 'to be delivered,' and there is a presumption of delivery to the addressee. Hagner v. United States, 285 U.S. 427, 431, 52 S.Ct. 417, 419, 76 L.Ed. 861."

In **Hagner v. United States**, 1932, 285 U.S. 427, the Supreme Court replied to a like criticism made after verdict on motion in arrest of judgment. While the Court properly left open the question of whether the indictment would have been subject to challenge at an earlier stage of the case, the rationale of the opinion goes to show that the first five counts of the present indictment are sufficient, especially so since they were returned after the adoption of the Federal Rules of Criminal Procedure, designed to eliminate technicalities in criminal pleading.[3] The first five counts meet the test of sufficiency prescribed in the **Debrow** case, **supra** note 3.

Count 6 is duplicitous, that is, it joins in the same count two distinct offenses. Paragraph number 3 of that count alleges:

"3. That . . . Raymond L. Goodman, while an officer of said Harold Corporation, in contemplation of bankruptcy proceedings by or against the said Harold Corporation, and with intent to defeat the bankruptcy laws of the United States, did knowingly and fraudulently transfer and conceal and convert to his own personal use, assets of the said Harold Corporation, to-wit, the assets represented by monies of the said corporation falsely and fraudulently credited to the account on the books and records of the said Harold Corporation entitled

[3] See United States v. Debrow, 1953, 346 U.S. 374, 376.

'Jeri Bolton', in violation of 18, USC, 152, Par. 6." Paragraph 5 of the same court charges:

> "5. That . . . the defendant Raymond L. Goodman transferred out of the Harold Corporation, converted to his own use and concealed from the officers of the bankruptcy court charged with securing and liquidating the assets of the said Harold Corporation, assets of the Harold Corporation represented by the following: . . ."

Thus, Count 6 charges one offense committed in contemplation of bankruptcy as defined in paragraph 6 of Section 152, Title 18, U.S.C.A.; and another offense committed after bankruptcy as defined in paragraph 1 of the same section. This error would, however, be harmless[4] if the United States were required to elect upon which charge it would proceed. The entire count should not be dismissed when a less drastic ruling will suffice.[5]

We do not think that Count 6 was made duplicitous by the use of the language "transfer and conceal and convert." See **Somburg v. United States,** 7 Cir., 1934, 71 F.2d 637; **Wolpa v. United States,** 8 Cir., 1936, 86 F.2d 35.

The defendant further criticizes Count 6 for using the word "assets" instead of the statutory word "property," and contends that "assets" has a broader meaning than "property." However, where "assets" is used in the

4 See Rule 52 (a), Federal Rules of Criminal Procedure, 18 U.S.C.A.

5 See Rule 2, Federal Rules of Criminal Procedure; United States v. Werner, E.D.Pa., 1918, 247 Fed. 708, 711; United States v. Charney, D.C. D Mass., 1942, 50 F.Supp. 581, 583.

count, it is in each instance described or limited by such a phrase as "represented by monies of the said corporation" or "represented by the following: (followed by a complete description of various checks)." Clearly, as so limited or described, "assets" is the legal equivalent of "property."

Count 7 also charges a violation of the criminal bankruptcy statute, 18 U.S.C.A. §152, par. 6. It alleges the fraudulent transfer of "the assets represented by the aforesaid 99-year lease held by the said Harold Corporation on the Cadillac Hotel, Miami Beach Florida." To contend that the words "represented by" have no legal meaning is, we think, hypercritical; and Count 7 is sufficient.

Count 8, the conspiracy count, named Robert L. Strauss as a co-defendant with Goodman. That count has been fully treated in the case of **United States of America** v. Robert L. Strauss, No. 18235, m s. It was there held that Count 8 is sufficient to the extent that it charges a conspiracy to commit offenses against the Bankruptcy Act, but insufficient to show a conspiracy to violate the Mail Fraud Statute, and that the presence of the surplusage does not justify dismissal of the entire count. We adopt that opinion as to the charge of Count 8 against Goodman.

The judgment dismissing all eight counts of the indictment as against Goodman is accordingly reversed and the cause remanded.

REVERSED AND REMANDED.

Opinion of **United States v. Strauss**, 5 Cir., 283 Fed. 155, referred to in and adopted by the Court in the foregoing opinion follows.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18235

UNITED STATES OF AMERICA,
Appellant,

versus

ROBERT L. STRAUSS,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(October 14, 1960.)

Before TUTTLE, CAMERON and WISDOM, Circuit Judges.

CAMERON, Circuit Judge: This appeal by the United States is from a judgment in the lower court granting a motion to dismiss that portion of an indictment purporting to charge the appellee Robert L. Strauss with a conspiracy to violate §§ 152 and 1341 of Title 18 U.S.C.[1]

[1] Title 18 U.S.C. §152 deals with the concealment of assets of a corporation in contemplation of bankruptcy and devising or taking other actions to defraud creditors of a bankrupt, and Title 13 U.S.C. § 1341 is the Mail Fraud Statute.

The sole question presented for our determination is whether the lower court erred in holding that such indictment, as against appellee Strauss, was insufficient and in entering an order dismissing it.

The indictment here is in eight counts, only count eight relating to appellee. Counts one through five charge one Raymond L. Goodman with mail fraud in violation of 18 U.S.C. § 1341; counts six and seven charge the same Goodman, as an agent of the Harold Corporation, with knowingly and fraudulently transferring and concealing assets in contemplation of bankruptcy in violation of 18 U.S.C. § 152. Count eight, which, as stated, is the only count applying directly to the appellee, alleges a conspiracy between the appellee and said Goodman, along with certain other unnamed conspirators, to commit violations of the same two federal statutes,[2] such conspiracy being itself a violation of 18 U.S.C. § 371.[3]

Motions to dismiss, for severance, and for a bill of particulars, all as to count eight, were filed on behalf of appellee Strauss, and said count was dismissed as to him.[4]

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2 §§ 152 and 1341 of Title 18 U.S.C.

3 Title 18 U.S.C. § 371: "Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned . . . or both."

4 The entire indictment with respect to Raymond L. Goodman was dismissed by order of the court below some six weeks after the dismissal of count eight as to appellee Strauss. That order is before this Court upon separate appeal.

After re-alleging certain allegations set forth in the first count of the indictment against Goodman only, count eight charges in its first numbered paragraph:

> "That from on or about January 1, 1956, continuously to about April 18, 1958, within the Southern District of Florida, Raymond L. Goodman, President of the said Harold Corporation, and Robert L. Strauss, in contemplation of a bankruptcy proceeding by or against the said Harold Corporation, and with intent to defeat the bankruptcy laws of the United States, did wilfully, knowingly, unlawfully and feloniously conspire, combine, confederate, and agree together each with the other and with other persons not herein named as defendants to knowingly and fraudulently transfer and cause to be transferred and conceal and cause to be concealed assets of the said Harold Corporation, and to devise and intend to devise a scheme and artifice to defraud creditors of the said Harold Corporation, such objects of said conspiracy being violations of Title 18, United States Code, Section 152 and Title 18, United States Code, Section 1341."

It is further alleged in said count eight that it was part of the conspiracy that the following acts should be performed: that the Harold Corporation would be formed and incorporated and the said Raymond L. Goodman would become president thereof; that capital stock would be issued to one Geraldine Bolton and Minnie Goodman, wife of Raymond L. Goodman, and placed on the books of the corporation at values in excess of the actual money paid into the corporation; that an account styled "Jeri

Bolton" would be set up on the books of the corporation and money fraudulently credited to this account, and that defendants Goodman and Struss would convert the same to their personal use through checks drawn against the corporation and credited to the account "Jeri Bolton;" that a ninety-nine year lease would be obtained on the Hotel Cadillac in Miami; that false statements would be made to secure loans on behalf of the said corporation and these loans converted to the personal use of the said defendants; that debenture bonds would be issued to Geraldine Bolton and Luella H. Strauss, wife of appellee, without consideration and thereafter sold with the proceeds being converted to the personal use of the defendants; and that it was intended that, when the inevitable bankruptcy approached, the assets of the corporation would be transferred beyond the reach of the creditors.

The indictment also charges in count eight that, in order to effect the objects of said conspiracy, eleven overt acts were performed by the conspirators including the following: the defendants drew a large number of checks in amounts aggregating some $191,000; of this amount $80,225.69 represented checks issued to "J. Bolton" which had been drawn by Goodman; the appellee himself was alleged to have received, endorsed and negotiated a check for $45,000.00 drawn in the name of the Harold Corporation. This overt act by the appellee was alleged to have been a violation of 18 U.S.C. §371.[5]

In its brief the United States bases its argument for reversal upon the assertion that, where a conspiracy

5 Note 3 supra.

has several objects, the insufficient pleading of one does not nullify the charge as to the other; and that it is unnecessary that an overt act of the appellee be alleged in the indictment "since one overt act in furtherance of the conspiracy and to accomplish one of its objects, committed by one of the conspirators, binds all co-conspirators." The appellee urges upon the Court, on the other hand, the correctness of the lower court's holding that count eight of the indictment was legally insufficient, contending that said count fails to allege that the conspiracy contemplated any use of the United States mails in the execution of the alleged scheme and artifice to defraud; and that it fails to state sufficient facts to show a conspiracy between himself and Raymond L. Goodman to perform the other acts enumerated above.

It is apparent from the record and briefs that the dismissal of count eight as to appellee was based upon the failure of the count to set forth facts sufficient to show a conspiracy to violate either the Mail Fraud Statute or the Bankruptcy Act. We think it is clear that the court below was correct in holding that count eight failed to charge a conspiracy participated in by defendant Strauss to violate the Mail Fraud Statute.[6] But we are unable

[6] The mere charge that the acts done in connection with the conspiracy were in violation of the said statute, 18 U.S.C.A. § 1341, is not sufficient where, as here, the facts alleged fail to support such a charge which amounts to nothing more than the statement of a legal conclusion. It was proper, therefore, for the court below to eliminate this charge from the indictment. Rule 7 F.R.Cr.P.; Sutton v United States, 5 Cir., 1946, 157 F.2d 661; Alabama Packing Co. v. United States, 5 Cir., 1948, 167 F.2d 179; United States v. Lembo, 3 Cir., 1950, 184 F.2d 4011.

to agree with its action in dismissing the entire count as to the appellee, it being our opinion that count eight is legally sufficient in its charge of a conspiracy to violate the Bankruptcy Laws, 18 U.S.C.A. § 152, by concealing assets of the corporation in contemplation of bankruptcy, by knowingly and fraudulently transferring property of the corporation with intent to defeat the bankruptcy laws, or by devising a scheme and artifice to defraud creditors of the corporation.

In passing upon the legal sufficiency of an indictment it is necessary only to determine whether it satisfies the requirements of the Sixth Amendment to the Constitution of the United States that the accused in a criminal prosecution shall be informed of the nature and cause of the accusation against him and is adequate to enable him to plead the judgment entered as res judicata of any further prosecution for the same offense.[7] The Supreme Court, in the case of **Bartell v. United States**, 1913, 227 U.S. 427, 431, announced the rule in these words:

> "It is elementary that an indictment, in order to be good under the federal Constitution and laws, shall advise the accused of the nature and cause of the accusation against him in order that he may meet the accusation and prepare for his trial and that, after judgment, he may be able to

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7 The following cases from this Circuit are applicable: Schnautz v. United States, 1959, 263 F.2d 625, certiorari denied, 360 U.S. 910, Roberson v. United States, 1956, 237 F.2d 536, certiorari denied, 356 U.S. 919; Duke v. United States, 1956, 233 F.2d 897; Hermansen v. United States, 1956, 228 F.2d 495, certiorari denied 230 F.2d 173, certiorari denied, 351 U.S. 924; Cagnina v. United States, 1955, 223 F.2d 149; Kreuter v. United States, 1955, 218 F.2d 532, certiorari denied, 349 U.S. 932.

plead the record and judgment in bar of further prosecution for the same offense."[8]

We feel that count eight satisfies this rule to the extent that it charges offenses against the Bankruptcy Act. Said count charges the appellee with an "intent to defeat the bankruptcy laws of the United States" and that, in furtherance of this intention, he "did wilfully, knowingly, unlawfully and feloniously conspire, combine and confederate and agree" with Raymond L. Goodman and other defendants not named therein to "knowingly and fraudulently transfer and cause to be transferred and conceal and cause to be concealed assets of the said Harold Corporation, and to devise and intend to devise a scheme and artifice to defraud creditors of the said Harold Corporation, such objects of said conspiracy being violative of Title 18 U.S. Code, §152 . . ." In addition, it is alleged that the appellee endorsed and negotiated a certain check in the sum of $45,000.00 in the name of the Harold Corporation in furtherance of the illegal objects above discussed. It is clear, therefore, that this charge is legally sufficient.

It is further clear that the failure of the indictment against appellee Strauss to chage adequately a violation of the Mail Fraud Statute is effective merely to eliminate that charge from the case; and so long as the remaining portions of the indictment adequately charge a crime, the presence of the surplusage will not justify dismissal

[8] See also Rosen v. United States, 1896, 161 U.S. 29; United States v. Behrman, 1922, 258 U.S. 280; Wong Tai v. United States, 1927, 273 U.S. 77; Hagner v. United States, 1932, 285 U.S. 427; United States v. Debrow, 1953, 346 U.S. 376.

of the entire indictment as it relates to appellee.

A leading Supreme Court case standing for this proposition is Ford v. United States, 1927, 273 U.S. 593.[9] The Supreme Court there held the indictment valid, saying that the portion of the indictment which it found faulty should be ignored as mere surplusage and that the defendant must answer only to those charges well pleaded.

The court below did not, of course, reach the motion for bill of particulars, and we express no opinion as to whether or not the motion should be granted. The judgment of the court below is affirmed in part and reversed in part and the case remanded for further proceedings in consonance with this opinion.

AFFIRMED IN PART AND IN PART REVERSED AND REMANDED.

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[9] And see Salinger v. United States, 1926, 272 U.S. 542; Goto v. Lane, 1924, 265 U.S. 393. See the following cases from this Circuit standing for this proposition: Bailey v. United States, 1925, 5 F.2d 437, certiorari dimissed, 269 U.S. 589; Tenenbaum v. Schnook, 1926, 15 F.2d 373; Sasser v. United States, 1928, 29 F.2d 76; Christiansen v. United States, 1931, 52 F.2d 950; Horowitz v. United States, 1933, 63 F.2d 706; Friscia v. United States, 1933, 63 F.2d 977.

A true copy

Clerk, U. S. Court of Appeals, Fifth Circuit
Test: EDWARD W. WADSWORTH,
By CLARA R. JAMES, Deputy

New Orleans, Louisiana
October 14, 1960.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Petition of Raymond L. Goodman, were this date deposited in the United States post office, Gainesville, Georgia, with air mail postage prepaid, addressed as follows: Solicitor General, Department of Justice, Washington, 25, D. C.; Rufus D. McLean, Esq., Special Attorney, Department of Justice, Washington 25, D. C.; and E. Coleman Madsen, Esq., United States Attorney, Miami, Florida.

This day of April, 1961.

Of Counsel

FILE COPY

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No. 900

In the Supreme Court of the United States

OCTOBER TERM, 1960

RAYMOND L. GOODMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys,
Department of Justice,
Washington 25, D.C.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet., 2d App. 1-5) [1] is reported at 285 F. 2d 378.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1960 (Pet. 18). A petition for re-

[1] The petition for a writ of certiorari designates as "appendix" pages 19 through 21, containing 18 U.S.C. 152 and the order extending time for filing. Also appended and separately numbered are the opinions of the court of appeals in *United States* v. *Goodman*, No. 18,284 and *United States* v. *Strauss*, No. 18,235, which we refer to herein as "2d App." and "3d App."

The designation "R." refers to the transcript of record in the court below.

hearing was denied on February 16, 1961 (Pet. 18). On March 10, 1961, Mr. Justice Black entered an order extending the time for filing a petition for a writ of certiorari to and including April 17, 1961 (Pet. 21), and the petition was filed on April 14, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment charging that an accused, for the purpose of executing a fraudulent scheme described in the indictment "knowingly caused [certain checks] to be delivered [to specified banks] by the United States Mails" is invalid for failure to state *in haec verba* that the mail was delivered "according to the directions thereon."

2. Whether the indictment sufficiently charges mailings in execution of the scheme, under *Parr* v. *United States*, 363 U.S. 370.

3. Whether an election by the government to proceed with respect to one of two offenses in a count is objectionable as an "amendment" of an indictment.

4. Whether the language of the indictment was sufficiently plain, concise, and definite.

5. Whether the conspiracy count sufficiently stated the facts relating to bankruptcy offenses under the conspiracy.

STATUTES AND RULES INVOLVED

The pertinent statutes and rules are appended hereto as Appendix A, *infra*, pp. 10–13.

STATEMENT

Count 1 of an indictment returned in the United States District Court for the Southern District of Florida, charged that, as part of a scheme to defraud, the petitioner, on January 1, 1956, formed the Harold Corporation which obtained loans upon the basis of misrepresentations, and "when it became apparent that the said Harold Corporation was on the verge of bankruptcy", transferred its assets out of the reach of creditors (R. 4–6). The indictment further charged that the petitioner, "on or about November 6, 1957, at Miami Beach, Florida * * * for the purpose of executing the aforesaid scheme * * * knowingly caused to be delivered by the United States Mails * * * on or about November 11, 1957, to the Miami Beach First National Bank" a specified check (R. 5–6).

Counts 2, 3, 4, and 5, realleged the scheme charged in the first count and charged in similar language that the petitioner, "for the purpose of executing the aforesaid scheme * * *, knowingly caused to be delivered by the United States mails at Miami Beach, Florida" specified checks (R. 6–9).

Count 6 charged that the petitioner, during the period from November 1, 1957, to April 18, 1958, knowing that Harold Corporation was subject to a petition in bankruptcy, did "transfer and conceal and convert to his own personal use" assets falsely credited to an account entitled "Jeri Bolton", set up by the petitioner on the books of the corporation; that by utilization of this account the petitioner "transferred out of the Harold Corporation, converted to his own

use and concealed from the officers of the bankruptcy court" assets in the aggregate sum of $110,325.69, represented by 54 checks specified in the count by date, amount, payee and bank (R. 9–13).

Count 7 charged that the petitioner "in contemplation" of the bankruptcy proceeding "and with intent to defeat the bankruptcy laws" transferred a 99-year lease held by the corporation on the Cadillac Hotel of Miami Beach (R. 13).

Count 8 charged that, from January 1, 1956, to April 18, 1958, the petitioner and one Strauss, "in contemplation of" the bankruptcy proceeding, conspired, together with others, to transfer and conceal assets of the corporation and to devise a scheme to defraud the creditors, parts of the scheme being the original incorporation, the issuance of its stock to Bolton and Minnie Goodman at excessive valuations, the setting up and operation of the "Jeri Bolton" account on the corporation's books, the obtaining of the 99-year lease, the obtaining of loans and issuance of debenture bonds upon the basis of misrepresentations, and the overt acts of issuing the respective checks specified in the other counts, and an additional $45,000 check of the corporation received and negotiated on November 15, 1956, by Strauss (R. 13–18).

The indictment was dismissed in the district court as to the petitioner upon his motion on March 1, 1960 (R. 22–23), and as to Strauss upon Strauss' motion on January 8, 1960 (R. 22). Upon appeal by the United States the court of appeals reversed both of the orders of dismissal (Pet. 18; Pet., 3d App. 7–8). Strauss has not petitioned for a writ of certiorari.

ARGUMENT

The petitioner is attacking the validity of the indictment before there has been any development of the facts. Had his motion been overruled by the district court, as it was by the court of appeals, he would have had no right of review. Hence, in addition to the lack of merit in the petitioner's challenge to the sufficiency of the indictment as a pleading, which we discuss below, there is no reason for this Court to review the issues at this interlocutory stage.

1. Counts 1 through 5 of the indictment, after stating the scheme for defrauding creditors, each charged that the petitioner, on a specific date, "for the purpose of executing the aforesaid scheme * * * knowingly caused to be delivered by the United States mails" on a stated later date to a named bank a check specifically described (R. 6–9). The petitioner challenges the sufficiency of these counts (Pet. 9–10), contending, in effect, that the statutory language must be employed *in haec verba, i.e.*, that the counts must state that the mail was caused to be delivered "according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed." Patently, the statutory provisions were covered by the language of the indictment that the petitioner knowingly caused the checks "to be delivered by the United States mails" to the named banks. There is a presumption that delivery was to the addressee. *United States* v. *Guest*, 74 F. 2d 730, 731 (C.A. 2). The indictment is a "plain, concise and definite written statement of the essential facts" as to

mailing, within the scope of Rule 7(c), F.R. Crim. P. See *United States* v. *Debrow*, 346 U.S. 374.[2]

2. The petitioner contends that the indictment failed to show that the use of the mails was in execution of the fraud as required by *Parr* v. *United States*, 363 U.S. 370. This argument ignores the fact that the decision in *Parr* was based on the evidence, not on the indictment. Moreover, on its facts, *Parr* involved a "unique" situation in which the mailings of tax notices by the school district were required by law, and the fraud consisted in the taking of tax funds by trustees of the district after the receipt thereof (363 U.S. at 391). Here the indictment specifically alleges that, as a part of the fraudulent scheme, assets of Harold Corporation would be transferred out of the reach of creditors. Nothing in *Parr* suggests that an indictment must negate every possible defense, and there is nothing from the face of the indictment to indicate that such a defense as that in *Parr* is applicable to this particular fraudulent scheme.

3. The petitioner contends with respect to Count 6 that he would not be afforded sufficient remedy with respect to a duplicitous count, which alleged an offense prior to bankruptcy and one concurrent therewith, by an order requiring the government to elect as suggested by the court of appeals (Pet., 2d App. 4). He seeks to treat such an election as "an amendment to the indictment without resubmitting the same

[2] *United States* v. *Hess*, 124 U.S. 483, cited by petitioner (Pet. 9), is inapposite. There the indictment was defective not because of an insufficiency in describing the mailing process but because it was devoid of any explanation of the nature of the fraud.

to the Grand Jury" (Pet. 13). But the petitioner's characterization of the situation is not correct. The indictment remains as found by the grand jury and all that is involved is the trial procedure under which only one of the several charges is tried. See *Salinger* v. *United States*, 272 U.S. 542, 548–549; *Ford* v. *United States*, 273 U.S. 593, 602. As observed by the court of appeals below (Pet., 2d App. 4), the entire count should not be dismissed when a less drastic ruling will suffice without harm to the petitioner. See Rules 2 and 52(a), F.R. Crim. P.; *United States* v. *Charney*, 50 F. Supp. 581, 583 (D. Mass.); *United States* v. *Werner*, 247 Fed. 708, 711 (E.D. Pa.), affirmed *sub nom. Schaefer* v. *United States*, 251 U.S. 466.[1]

4. The petitioner contends, without specifying the language to which he takes exception (Pet. 14–15), that the indictment is not sufficiently plain, concise, and definite. The extent and detail of the indictment arose from the extent and intricacy of the petitioner's fraudulent devices and operations. Moreover, if there were any merit in the petitioner's criticism, his remedy would be by an appropriate, precise motion

[1] The decisions which petitioner cites, *Ex parte Bain*, 121 U.S. 1, 4; *Edgerton* v. *United States*, 143 F. 2d 697, 698 (C.A. 9); and *Carney* v. *United States*, 163 F. 2d 784, 788 (C.A. 9), are not analogous, since they involve amendments to the statement of the charge. The remaining citations by petitioner (*United States* v. *Dembowski*, 252 Fed. 894 (E.D. Mich.); *Creel* v. *United States*, 21 F. 2d 690 (C.A. 8); and *Bratton* v. *United States*, 73 F. 2d 795 (C.A. 10)), to the extent that they are not distinguished by their facts, are contrary to the rationale of this Court's holdings in *Salinger* and *Ford*, *supra*. And see the extensive review of authorities in *United States* v. *Stepp*, 144 F. Supp. 826, 827–829 (D. Colo.).

to strike surplusage. There is no reason for this Court to review the decision of the court below on the particular allegations, a decision which has no general application.[4]

5. As to the conspiracy count the court below held that it did not adequately allege a conspiracy to commit mail fraud, but that it did sufficiently allege conspiracy to commit a bankruptcy offense.[5]

The petitioner contends (Pet. 16) that he cannot know "what is essential to" the conspiracy count as upheld. The transfers of corporate moneys, listed in the count, commenced on September 17, 1957 (R. 16), less than a month and a half before Harold Corporation was alleged to be subject to the filing of a petition in bankruptcy (R. 9). The petitioner accordingly has no problem as to what portion of the count to answer—the whole of it applies to the conspiracy to commit bankruptcy offenses.

CONCLUSION

The judgment below is a correct application of established principles to a limited factual situation.

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[4] The petitioner's citation of *United States* v. *Williams*, 202 F. 2d 572, 574 (C.A. 5), for its criticism of some types of language of an indictment must be read in light of the issues there as to whether the basic element of scienter in a narcotics offense had been charged. See the same case (prior to the cited rehearing) at 202 F. 2d at 713–714.

[5] The defect in the charge with respect to the mail fraud aspect was that in the statement of the intent of the conspiracy the mail fraud was not specifically charged. No such defect exists as to the bankruptcy aspect, for the count charges that petitioner, Strauss, and others conspired "with intent to defeat the bankruptcy laws" (R. 14).

No conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

MAY, 1961.

APPENDIX A

Statutes and Rules Involved

18 U.S.C. 152:

Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy preceeding; or

Whoever knowingly and fraudulently presents under oath any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or

Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 7, F.R. Crim. P.:

* * * * *

(c) *Nature and Contents.*

The indictment or the information shall be a plain, concise and defini[te] written statement of the essential facts const[it]uting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. * * *

(d) *Surplusage.*

The court on motion of the defendant may strike surplusage from the indictment or information.

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Rule 12(b), F.R. Crim. P.:

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(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but

the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. * * *

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